

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JIMMIE DALE OTTO,

Petitioner,

No. CIV S-02-0069 MCE DAD P

vs.

DIRECTOR OF THE CALIFORNIA
DEPARTMENT OF MENTAL
HEALTH,

FINDINGS AND RECOMMENDATIONS

Respondent.

Petitioner is a former state prisoner who has been subsequently confined under a civil commitment. He is proceeding through counsel with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges both a March 11, 1999 finding by the Solano County Superior Court that he was a sexually violent predator pursuant to § 6600 of the California Welfare and Institutions Code and his resultant two year commitment to Atascadero State Hospital (Atascadero). He seeks relief on the grounds that he was deprived of due process under the Fourteenth Amendment by the trial court's admission of multiple-level hearsay evidence to establish that he had been twice convicted of "sexually violent offenses," an element required for a civil commitment. Upon careful consideration of the record and the applicable law, the undersigned will recommend that petitioner be denied habeas corpus relief.

PROCEDURAL BACKGROUND

2 On March 11, 1999, petitioner was found by the Solano County Superior Court to
3 be a sexually violent predator (hereinafter SVP) pursuant to § 6600 of the California Welfare and
4 Institutions Code (hereinafter SVPA).¹ Petitioner was civilly committed to Atascadero State
5 Hospital for two years commencing March 5, 1999, and ending on March 5, 2001. (Resp’t’s
6 March 21, 2002 Mot. to Dismiss (MTD), Ex. 1.) On February 1, 2001, while petitioner was still
7 confined pursuant to the March 5, 1999 commitment and while his appeal from that commitment
8 was still pending in the state courts, the Solano County District Attorney filed a petition for
9 recommitment. (Id., Exs. 3 & 4.) On February 22, 2001, petitioner, represented by counsel,
10 appeared in court and waived his right to a probable cause hearing, waived time for trial on the
11 recommitment petition and agreed to remain at Atascadero State Hospital pending the outcome
12 of his appeal. (Id., Ex. 5.)² At subsequent hearings conducted on September 6, 2001, October
13 10, 2001 and January 23, 2002, petitioner again waived time and requested that the probable
14 cause hearing and trial be continued until after his recovery from a scheduled surgery. (Id., Exs.
15 6, 7 & 8.) As of March 21, 2002, when respondent filed a motion to dismiss this action, trial on
16 the recommitment petition was set for July 24, 2002. (Id., Ex. 8.)³

17 In his March 21, 2002 motion to dismiss, respondent argued that petitioner was no
18 longer in custody within the meaning of 28 U.S.C. §§ 2241(c)(3) and 2254(a) when he filed the

¹ A sexually violent predator is defined in California law as “a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.” Cal. Welf. & Inst. Code § 6600(a)(1).

23 ² Pursuant to California law, a probable cause hearing is held after a petition for
24 commitment is filed to determine “whether there is probable cause to believe that the individual
named in the petition is likely to engage in sexually violent predatory criminal behavior upon his
or her release.” Cal. Welf. & Inst. Code § 6602(a).

25 ³ This court has independently verified that petitioner currently remains a patient at
26 Atascadero. The basis for petitioner's continuing commitment is not known to the court but
appears irrelevant to the disposition of the pending petition.

1 instant petition on January 10, 2002.⁴ The motion to dismiss was denied by order dated January
2 27, 2003. This court found that petitioner was in custody by virtue of his involuntary
3 confinement in Atascadero State Hospital when he filed his federal habeas corpus petition and
4 that the expiration of the challenged civil commitment did not defeat federal jurisdiction over
5 this action.

6 **FACTUAL BACKGROUND⁵**

7 On October 9, 1991, Jimmie Dale Otto pled no contest to four
8 felony counts of lewd and lascivious conduct on a child less than
9 14 years of age (Pen. Code, § 288, subd. (a)). The factual basis for
10 the plea was “contained in the police report.” The four counts
11 involved four different victims – K.W., M.S., A.S., and D.S. Dr.
12 Charlene Steen, appointed to examine Otto, stated in her report,
13 which was attached to the presentence report, that Otto admitted he
14 touched K.W. under her pants on one occasion, tickling her
15 buttocks and “private areas” without any sexual intent. Otto also
16 told the probation officer he tickled K.W. on her bottom under her
17 panties. He denied having molested any of the S. children, and
18 stated he had pled no contest because his attorney told him this was
19 the best possible deal. On December 13, 1991, Otto was sentenced
20 to 12 years in state prison. On February 27, 1998, the People filed
21 a petition seeking Otto’s commitment as an SVP. Otto moved in
22 limine to exclude “police or other hearsay reports” and prevent
23 psychological evaluators from relying on them. The trial court
24 denied the motion. Otto waived his right to a jury trial. Both the
25 People and Otto presented experts who reviewed and relied on the
26 presentence report and other documents. As relevant here, the
People’s three experts⁶ concluded two of Otto’s prior offenses

⁴ Title 28 U.S.C. § 2241(c)(3) limits jurisdiction to persons who are “in custody in violation of the Constitution or laws or treaties of the United States.” Title 28 U.S.C. § 2254(a) limits federal jurisdiction to “an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

⁵ The following summary is drawn from People v. Otto, 26 Cal. 4th 200, 203-04 (2001), in which the California Supreme Court rejected petitioner’s arguments on appeal from his commitment to Atascadero State Hospital and held that the use of presentence and probation reports to prove the details of the predicate offenses in a sexually violent predator civil commitment hearing does not violate a defendant’s due process rights.

⁶ At the People’s request, the trial court admitted the abstract of judgment and presentence report from Otto’s felony convictions for molesting K.W., M.S., A.S., and D.S., a 1991 evaluation by Dr. Steen that accompanied the presentence report, the written psychological

1 involved substantial sexual conduct.⁷ Indeed, although one defense
2 expert, who did not testify, opined in his written report Otto was
3 not likely to engage in sexually violent criminal behavior as a
4 result of his diagnosed mental disorder, he also concluded Otto had
5 been convicted of sexually violent predatory offenses against two
6 or more victims. The other defense expert declined to offer an
7 opinion regarding this latter issue, although he noted in his written
8 report “the descriptions of the crimes strongly suggest that they
9 included ‘sexual violence.’”⁸ The trial court found beyond a
10 reasonable doubt that Otto was an SVP within the meaning of
11 section 6600, and ordered him committed to Atascadero State
12 Hospital or other secure facility for two years.

13 The Court of Appeal affirmed, and denied Otto’s subsequent
14 petition for rehearing. We granted Otto’s petition for review, and
15 limited the issues to whether section 6600(a)(3) allows the
16 admission of multiple hearsay that does not fall within any
17 exception to the hearsay rule, and if so, whether reliance on this
18 evidence violates a defendant’s right to due process.

11 ANALYSIS

12 I. Standards of Review Applicable to Habeas Corpus Claims

13 A writ of habeas corpus is available under 28 U.S.C. § 2254 only on the basis of
14 some transgression of federal law binding on the state courts. See Peltier v. Wright, 15 F.3d 860,
15 861 (9th Cir. 1993); Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v.
16 Isaac, 456 U.S. 107, 119 (1982)). A federal writ is not available for alleged error in the
17 interpretation or application of state law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991);
18 Park v. California, 202 F.3d 1146, 1149 (9th Cir. 2000); Middleton, 768 F.2d at 1085.

19 However, a “claim of error based upon a right not specifically guaranteed by the
20 Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so

22 evaluations of Dr. Zinik, Dr. Jackson, and Dr. Sreenivasan, and the notification of evaluation as
23 an SVP.

24 ⁷ In addition to this conclusion which is at issue here, the People’s experts relied on
25 additional factors, such as Otto’s admission he had molested his minor stepchildren (not the same
victims as those in the predicate offenses) and his substance abuse problem, in opining Otto
satisfied the criteria for the Sexually Violent Predators Act (SVPA), section 6600 et seq.

26 ⁸ At Otto’s request, the trial court admitted the written psychological evaluations of Dr.
Halon and Dr. Owen.

1 infects the entire trial that the resulting conviction violates the defendant's right to due process.”
2 Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th
3 Cir. 1980)). See also Lisenba v. California, 314 U.S. 219, 236 (1941); Henry v. Kernan, 197
4 F.3d 1021, 1031 (9th Cir. 1999). In order to raise such a claim in a federal habeas corpus
5 petition, the “error alleged must have resulted in a complete miscarriage of justice.” Hill v.
6 United States, 368 U.S. 424, 428 (1962). See also Henry, 197 F.3d at 1031; Crisafi v. Oliver,
7 396 F.2d 293, 294-95 (9th Cir. 1968). Habeas corpus cannot be utilized to try state issues de
8 novo. Milton v. Wainwright, 407 U.S. 371, 377 (1972).

9 Because this action was filed after April 26, 1996, the provisions of the
10 Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) are applicable. See Lindh v.
11 Murphy, 521 U.S. 320, 336 (1997); Clark v. Murphy, 331 F.3d 1062, 1067 (9th Cir. 2003).
12 Section 2254(d) as amended by the AEDPA, sets forth the following standards for granting
13 habeas corpus relief:

14 An application for a writ of habeas corpus on behalf of a
15 person in custody pursuant to the judgment of a State court shall
16 not be granted with respect to any claim that was adjudicated on
the merits in State court proceedings unless the adjudication of the
claim -

17 (1) resulted in a decision that was contrary to, or involved
18 an unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable
20 determination of the facts in light of the evidence presented in the
State court proceeding.

21 28 U.S.C. § 2254(d). See also Penry v. Johnson, 532 U.S. 782, 792-93 (2001); Williams v.
22 Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

23 II. Jurisdiction

24 As explained above, this court has previously determined, in connection with
25 respondent’s motion to dismiss, that petitioner was “in custody” within the meaning of 28 U.S.C.
26 §§ 2241(c)(3) and 2254(a) when he filed the instant petition on January 10, 2002. More recently,

1 the Ninth Circuit Court of Appeals has had the opportunity to address the question of under what
2 circumstances the claims of petitioner's challenging civil commitments such as that at issue here
3 are rendered moot by the expiration of the term of commitment. In addition, the Ninth Circuit
4 has addressed whether a petitioner who does not file a federal habeas petition until after a term of
5 civil commitment has expired has standing to collaterally attack that underlying civil
6 commitment. Below the undersigned will briefly address these issues in the context of the
7 pending petition, concluding that petitioner has standing to bring his claims and that they have
8 not been rendered moot.

9 In Hubbart v. Knapp, 379 F.3d 773 (9th Cir. 2004), the government argued that
10 the case was moot because the original term of commitment under the SVPA which was being
11 challenged by petitioner had expired and he was confined pursuant to a new two year term. (Id.
12 at 777.) The court rejected the argument holding that the petitioner's challenge was not moot
13 because his claims were "capable of repetition yet evading review." (Id.) In this regard, the
14 court found that the "capable of repetition" component of the analysis was satisfied because the
15 petitioner had already been confined pursuant to a second commitment proceeding and a third
16 petition to commit him was pending. (Id. at 777-78 & n.1.) The court also concluded that the
17 claimed harm evaded review because petitioner's two-year term was too short to be fully litigated
18 through the federal appellate process before the term expired. (Id. at 778.)

19 The same is true in this case. At the time petitioner filed the instant petition, the
20 state had filed a second SVPA commitment proceeding against him. This court has verified that
21 petitioner remains a patient at Atascadero. Therefore, there is a reasonable expectation that
22 petitioner will be subject to continued commitment in the future. Further, petitioner could not
23 pursue his claims through the federal appellate process before his two-year term expired. Thus,
24 like the situation presented to the court in Hubbard, petitioner's claims are capable of repetition
25 yet evading review. Therefore, this action has not been rendered moot.

26 ////

1 With respect to standing, in Jackson v. Cal. Dept. of Mental Health, 399 F.3d
 2 1069 (9th Cir. 2005), the court recently held that a petitioner lack standing to challenge an
 3 expired SVPA confinement term where he had voluntarily recommitted himself.⁹ The court
 4 concluded that the decision in Hubbard did not compel a different result because Jackson's term
 5 had expired before he filed his habeas petition. (Id. at 1072.) Most importantly, the court found
 6 that because no further recommitment petition had been filed by the state and the petitioner was
 7 in custody only because he had voluntarily recommitted himself, his confinement was not fairly
 8 traceable to any action by the state. (Id. at 1074-75.) Because the petitioner had failed to
 9 demonstrate that he was suffering harm associated with the SVPA confinement order, he was
 10 found to lack standing to challenge the state court's jurisdiction.

11 However, petitioner's case is factually distinguishable from that presented in
 12 Jackson. Here, the state filed a second recommitment proceeding prior to the expiration of
 13 petitioner's first term of commitment. Although petitioner voluntarily waived time for trial in
 14 that matter, he did not voluntarily recommit himself and there is no indication in the record that
 15 petitioner would have remained at Atascadero State Hospital if the state had not filed a second
 16 petition for recommitment. Further, petitioner was required under California law to remain in
 17 custody under the initial commitment order until the recommitment petition was tried. See Cal.
 18 Welf. & Inst. Code § 6604 (a "person shall not be kept in actual custody longer than two years
 19 unless a subsequent extended commitment is obtained from the court incident to the filing of a
 20 petition for extended commitment") and § 6601.5 (if the judge determines that a petition for
 21 commitment supports a finding of probable cause, "the judge shall order that the person be
 22 detained in a secure facility until a hearing can be completed"). For these reasons, in this case
 23 petitioner's continued confinement was "directly traceable" to the state's second commitment

24
 25 ⁹ In order to have standing to bring a claim, a litigant must have suffered "(1) an 'injury
 26 in fact' that is (2) 'fairly traceable' to the state court's commitment order that he challenges, and
 (3) that is 'likely [to be] redressed by a favorable decision.' Jackson, 399 F.3d at 1071 (quoting
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000).

1 petition. Petitioner has also suffered an “injury in fact” (continued commitment) which would be
2 addressed by a favorable decision on his claims. Thus, petitioner has satisfied all of the
3 requirements to confer on him standing to present his claims to this court. Jackson, 399 F.3d at
4 1071-75. Accordingly, below the court will address petitioner’s claims on the merits.

5 III. Petitioner’s Claims

6 Petitioner alleges that he was deprived of due process under the Fourteenth
7 Amendment by the trial court’s admission of multiple-level hearsay evidence (the probation
8 report reflecting the victims’ descriptions of the offenses) to prove that he had been twice
9 convicted for “sexually violent offenses,” which is an element required for a civil commitment.¹⁰
10 Petitioner claims that admission of this evidence violated his right to due process in that (1) he
11 was deprived of his right to confront and cross-examine the witnesses against him as guaranteed
12 by Specht v. Patterson, 386 U.S. 605, 609-10 (1967); (2) the evidence admitted over his
13 objection was of a type that could not be admitted in a criminal trial as explained by the Supreme
14 Court in Idaho v. Wright, 497 U.S. 805 (1990); and (3) the result was to relieve the state of its

15
16 ¹⁰ At the time of petitioner’s commitment, Cal. Welf. & Inst. Code § 6600(a) (3) provided:

17 Conviction of one or more of the crimes enumerated in this section
18 shall constitute evidence that may support a court or jury
19 determination that a person is a sexually violent predator, but shall
20 not be the sole basis for the determination. *The existence of any*
21 *prior convictions may be shown with documentary evidence. The*
22 *details underlying the commission of an offense that led to a prior*
23 *conviction, including a predatory relationship with the victim, may*
24 *be shown by documentary evidence, including, but not limited to,*
25 *preliminary hearing transcripts, trial transcripts, probation and*
26 *sentencing reports, and evaluations by the State Department of*
27 *Mental Health.* Jurors shall be admonished that they may not find
28 a person a sexually violent predator based on prior offenses absent
29 relevant evidence of a currently diagnosed mental disorder that
30 makes the person a danger to the health and safety of others in that
31 it is likely that he or she will engage in sexually violent criminal
32 behavior.

33 (italics added). The italicized portion of this code section is placed at issue by the habeas
34 petition pending before the court.

1 burden to prove beyond a reasonable doubt, or at least by clear and convincing evidence, all of
2 the facts necessary to justify his confinement, contrary to the holdings in Addington v. Texas,
3 441 U.S. 418, 425 (1979) and Foucha v. Louisiana, 504 U.S. 71 (1992). (Pet. at 3-4.)

4 The California Supreme Court thoroughly considered and addressed petitioner's
5 argument that the admission of hearsay statements in an SVP proceeding violated his due process
6 right to confrontation and the concomitant right to be convicted only upon reliable evidence. See
7 People v. Otto, 26 Cal. 4th 200, 209-215 (2001). At the outset the California Supreme Court
8 acknowledged that a defendant in an SVP proceeding is entitled to due process protections. Otto,
9 26 Cal. 4th at 209 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)). Applying the relevant
10 factors to determine what process is due in this context, the court held petitioner's right to due
11 process had not been violated by the admission of hearsay at his civil commitment proceeding.
12 (Id. at 210-15.) In this regard, the court first noted that the private interests affected by the
13 official action are the significant limitations on the defendant's liberty, the stigma of being
14 classified as an SVP, and subjection to unwanted treatment. Id. at 210 . Next, the court
15 considered the risk of an erroneous deprivation of such interests through the procedures used. Id.
16 The court concluded that the victim hearsay statements must contain "special indicia of reliability
17 to satisfy due process" but also observed that under the circumstances generally present in an
18 SVP proceeding, this requirement would almost always be met. Id. According to the California
19 Supreme Court, the most critical factor demonstrating the reliability of the victim hearsay
20 statements is that the defendant was convicted of the crimes to which the statements relate. Id. at
21 211. Because the SVPA requires conviction of a sexually violent offense against two or more
22 victims, some portion, if not all, of the alleged conduct will have been already either admitted in
23 a plea or found true by a trier of fact after trial. Id. Additionally, the court noted that
24 consideration of hearsay statements contained in presentence reports is not unique to the SVPA.
25 Id. at 212-14. The reliability of such statements withstands scrutiny, the court suggested, because
26 by statute criminal defendants must be provided the opportunity to review and challenge

1 inaccuracies contained in such reports. Id. at 212. For all these reasons, the California Supreme
2 Court concluded that there was no deprivation of the defendant's rights as a result of the reliance
3 on the hearsay statements. Id. at 214.

4 The California Supreme Court also found that reliance on victim hearsay
5 statements in a SVP proceeding does not deny the defendant any right of confrontation, noting
6 that there is no right to confrontation under the state and federal Confrontation Clause in civil
7 proceedings. Id. at 214. The court concluded that under the SVPA, a defendant's due process
8 right to confront witnesses is preserved because the defendant has the right to cross-examine any
9 prosecution witness who testifies in connection with the underlying criminal charges. Id. Next,
10 the court found that the government's interest in protecting the public from those who are
11 dangerous and mentally ill could potentially be impeded by requiring live victim testimony,
12 noting that the SVP proceeding occurs at the end of the defendant's sentence, which may be years
13 after the events in question. Id. at 214. Finally, the California Supreme Court concluded that
14 reliance on hearsay evidence in SVP proceedings does not impede the defendant's interest in
15 being informed of the nature, grounds, and consequences of the commitment proceeding nor
16 prevents the defendant from presenting his side of the story before a responsible government
17 official. Id. at 215.

18 At the outset it must be noted that the United States Supreme Court has not
19 considered the question whether a defendant must be afforded the right to confront and cross-
20 examine witnesses before he may be involuntarily committed pursuant to a state's sexually
21 violent predator law. For this reason, it may not be said that the California Supreme Court's
22 decision in Otto was contrary to, or an unreasonable application of, clearly-established federal
23 law. See Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004); Brewer v. Hall, 378 F.3d
24 952, 955 (9th Cir. 2004). Moreover, to the extent the United States Supreme Court has addresses
25 the issue in somewhat similar contexts the decision of the California Supreme Court is not an
26 objectively unreasonable application of federal law in this area.

1 The United States Supreme Court has held that involuntary commitment under a
2 sexually violent predator act is not a "criminal" proceeding, but is civil in nature. Kansas v.
3 Hendricks, 521 U.S. 346 (1997). The Supreme Court has also held that civil commitments
4 involve a significant deprivation of liberty and therefore mandate due process protections.
5 Foucha, 504 U.S. at 80 (involuntary commitment of insanity acquittee); Jackson v. Indiana, 406
6 U.S. 715, 738-39 (1972) (involuntary commitment of criminal defendant who was incompetent
7 to stand trial). The Sixth Amendment right to confrontation is limited by its express terms to
8 criminal defendants. U.S. Const., Amend. VI. Therefore, as found by the California Supreme
9 Court, in civil proceedings the right to confront and cross-examine witnesses is grounded in the
10 Due Process Clause and not in the Sixth Amendment. See Austin v. United States, 509 U.S. 602,
11 608 n.4 (1993) (Confrontation Clause does not apply in civil cases). In analogous circumstances,
12 the United States Supreme Court has held that in parole revocation proceedings due process does
13 not require confrontation and cross-examination of adverse witnesses if the hearing officer finds
14 good cause for not allowing confrontation. Morrissey v. Brewer, 408 U.S. at 489. Likewise, in
15 Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court held that one's right to due process
16 was not violated by the use of documentary substitutes for live evidence at a probation revocation
17 hearing. Id. at 782 n.5 ("[W]e emphasize that we did not in Morrissey intend to prohibit use
18 where appropriate of the conventional substitutes for live testimony, including affidavits,
19 depositions, and documentary evidence.") The California Supreme Court's detailed finding of
20 good cause for the use of documentary evidence in SVP civil commitment proceedings is a
21 reasonable application of these United States Supreme Court holdings.¹¹

22
23 ¹¹ In Crawford v. Washington, 541 U.S. 36 (2004), the Supreme Court held that the
24 Confrontation Clause bars the state from introducing into evidence in a criminal proceeding
25 out-of-court statements which are testimonial in nature unless the witness is unavailable and the
26 defendant had a prior opportunity to cross-examine the witness, regardless of whether such
statements are deemed reliable. Id. at 68-69. As discussed above, in Otto the California
Supreme Court concluded that for use in an SVP proceeding the victim hearsay statements must
"contain special indicia of reliability to satisfy due process." 26 Cal. 4th at 210. Because
Crawford requires that there be a right to in-court confrontation as opposed to a judicial finding

1 The cases cited by petitioner do not dictate a contrary result. In Specht v.
2 Patterson, 386 U.S. 606 (1967), the defendant was convicted but not sentenced under one statute
3 and was thereafter sentenced under the Colorado Sex Offenders Act for an indeterminate term
4 without notice and a full hearing. The Colorado Sex Offenders Act did not make commission of
5 a specified crime the basis for sentencing, but made one conviction the basis for commencing
6 another proceeding to determine whether a person constituted a threat of bodily harm to the
7 public or was an habitual offender and mentally ill, which was a new finding of fact that was not
8 an ingredient of offense charged. Thus, Specht was subjected to a sentence of up to life
9 imprisonment after being convicted of an offense with a statutory maximum sentence of ten
10 years. Id. at 607. The Supreme Court indicated that, in view of the consequences, the sentencing
11 proceedings amounted to a new criminal charge against the defendant. Id. at 610. Accordingly,
12 the court held that a defendant in such a circumstance is entitled to a full panoply of due process
13 rights, including the right to confront witnesses, when a sentencing proceeding results in an
14 additional criminal conviction. 386 U.S. at 610.¹²

15 Here, on the contrary, petitioner was not subjected to increased criminal
16 punishment as a result of his commitment under the SVPA. As discussed above, petitioner's
17 commitment to Atascadero State Hospital was pursuant to a civil commitment and was not a
18

19 of reliability, it might be argued that the use of presentence reports in SVP proceedings violates a
20 sex offender's right to confrontation. However, this court concludes that the holding in Crawford
21 does not apply in the context of the SVPA. Nothing in Crawford extended the Sixth Amendment
22 Confrontation Clause to civil litigants, including those named as defendants in SVP proceedings.
23 Further, the decision in Crawford did not expressly nor impliedly modify or overrule existing law
concerning a civil litigant's due process right to confront witnesses. Thus, the opinion of the
California Supreme Court that the use of hearsay evidence to prove that petitioner had been twice
convicted for "sexually violent offenses" is also not contrary to or an unreasonable application of
the Supreme Court's decision in Crawford.

24 ¹² One court has observed that the decision in Specht "is a precursor of Apprendi v. New
25 Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), which hold that facts
increasing the statutory maximum punishment must be proved, to the jury's satisfaction, beyond a
reasonable doubt, using the procedures normally employed at a trial--which per Specht includes
the opportunity to confront and cross-examine one's accusers in the flesh." Szabo v. Walls, 313
26 F.3d 392, 398-99 (7th Cir. 2002).

1 criminal punishment. See Hendricks, 521 U.S. at 361-62 (holding that involuntary confinement
2 pursuant to the Kansas Sexually Violent Predator Act was not punitive, thus precluding a finding
3 of any double jeopardy or ex post facto violation). For these reasons, the decision of the
4 California Supreme Court rejecting petitioner's claim in this regard is not contrary to or an
5 unreasonable application of Specht.¹³

6 Finally, petitioner claims that the use of hearsay evidence at his commitment
7 proceeding relieved the state of its burden to prove his SVP status "beyond a reasonable doubt, or
8 at least by clear and convincing evidence," contrary to the holdings in Addington v. Texas and
9 Foucha v. Louisiana. (Pet. at 4.) In Addington v. Texas, 441 U.S. 418 (1979) the Supreme Court
10 determined that to meet due process demands, the standard for use in commitment for mental
11 illness must be proof greater than the preponderance of evidence standard applicable to other
12 categories of civil cases and must be no less than clear and convincing evidence but that the
13 reasonable-doubt standard was not constitutionally required. 441 U.S. at 425. Similarly, in
14 Foucha, the Supreme Court held that "the State must establish insanity and dangerousness by
15 clear and convincing evidence in order to confine an insane convict beyond his criminal
16 sentence, when the basis for his original confinement no longer exists." 504 U.S. at 86. Having
17 determined that due process was not violated by the reliance on hearsay evidence at his civil
18 commitment hearing, petitioner's argument in this regard must fail. There is no indication that
19 the documentary evidence with respect to his prior sexually violent predatory offenses admitted
20 at petitioner's commitment proceeding did not rise to the appropriate level of proof required to
21 support a civil SVP commitment.

22

23

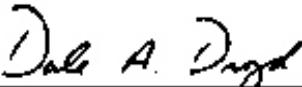
¹³ Likewise, petitioner's argument that the hearsay evidence admitted to support his civil commitment was "of a type that could not be admitted in a criminal trial," in violation of Idaho v. Wright (Pet. at 3-4) must also be rejected. In that case the Supreme Court held that the hearsay statements of the child victim admitted against petitioner at his trial on criminal charges lacked the particularized guarantees of trustworthiness required for admission under the Confrontation Clause. Idaho v. Wright, 497 U.S. 805, 818 & 827 (1990). Again, because petitioner's civil commitment proceeding was not a criminal prosecution the holding in Wright is not applicable.

1 For all of the reasons explained above, this court concludes that the decision of
2 the California Supreme Court that the use of hearsay evidence at petitioner's civil commitment
3 hearing under the SVPA did not violate due process is neither contrary to or an unreasonable
4 application of federal law.

5 Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for
6 a writ of habeas corpus be denied.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
9 days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
12 shall be served and filed within ten days after service of the objections. The parties are advised
13 that failure to file objections within the specified time may waive the right to appeal the District
14 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: April 28, 2005.

16 
17 DALE A. DROZD
18 UNITED STATES MAGISTRATE JUDGE

19 DAD:8:otto69.hc